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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND JAMES NUTTING, Defendant and Appellant.	C076803 (Super. Ct. Nos. P13CRF0294, P13CRM0744)

Indicted for alleged felonies, defendant Raymond James Nutting, who was a member of the El Dorado County Board of Supervisors, received money from county employees and a contractor who does business with the county to make a cash bail deposit. A jury acquitted defendant of all but one felony count and could not reach a verdict as to the other; however, the jury convicted defendant of misdemeanors for receiving loans from the county employees and the contractor who does business with the county and for failing to document the loans. (Gov. Code, §§ 87460, 87461.) The trial

court granted probation and declared vacant defendant's seat on the Board of Supervisors. Defendant appeals.

In his opening brief, defendant contends: (1) the trial court improperly instructed the jury on the definition of "personal loan"; (2) the court improperly refused to give the defense's proposed instruction on cash bail deposits; (3) the instruction given by the court on personal loans undermined the scienter element of the crimes; and (4) the errors were prejudicial. Underlying all of these contentions is the unsupported assumption that, if those who gave defendant money did so for him to use as a cash bail deposit, the transfer of money did not constitute a personal loan. In his reply brief, defendant, for the first time, proposes a theory to support that assumption: he claims that (5) he received the money, not as loans, but instead in trust or as a bailment.

We conclude that none of defendant's contentions has merit. (1) The trial court did not mislead the jury on the definition of a personal loan under the circumstances of this case; (2) the trial court did not err by refusing to give defendant's requested instruction about cash bail deposits because whether the parties to the loan intended for defendant to use the money he received for a cash bail deposit was not relevant to whether he committed the charged misdemeanors; (3) the trial court did not mislead the jury concerning the scienter element of the crimes; and (4) defendant forfeited reliance on a trust or bailment theory and, in any event, he fails to establish that those theories apply to the facts of this case.

We therefore affirm.

BACKGROUND

Defendant served on the El Dorado County Board of Supervisors for various terms from 1992 to 2014, when he was sentenced in this case. In May 2013, defendant was indicted on four felony counts. We need not recount the facts underlying the felony counts because he was not convicted on those counts. Defendant found out he had under two hours before he needed to turn himself in at the county jail. During those hours, he

frantically tried to make arrangements to post a cash bail deposit of $55,000 and obtained money from family and from three people relevant to this proceeding: Douglas Veerkamp, Katherine Miller, and Kathryn Tyler. Some of the money was handed to defendant's wife, but he does not argue that it made a difference that it was handed to his wife and not to him.

Douglas Veerkamp was a longtime friend of defendant and defendant's family. Veerkamp owned Doug Veerkamp General Engineering and had contracts to do work for El Dorado County. Defendant contacted Veerkamp and asked him to help with bail. Within a half hour, Veerkamp wired $20,000 to defendant's bank account. He expected to be repaid, even though there was no written agreement concerning the money. Defendant was processed at the jail and bailed out within about two hours. He returned the money to Veerkamp by check about four hours after he received the money because he did not need it for bail.

Katherine Miller was employed as defendant's assistant at the El Dorado County Board of Supervisor's office. During the two hours defendant was collecting money for bail, Miller walked into defendant's office and overheard defendant talking on the phone to his family members about bail money. Miller told defendant's wife that she thought she could get some money. She left defendant's office and said to deputy clerk Kathryn Tyler, "I'm going to go get some money for Supervisor Nutting." Miller went home and returned with $50,000 in cash. She went into defendant's office and handed the money to defendant's wife. Miller testified that she considered the money "bail money that I would be getting back when Supervisor Nutting was released." She also testified that she "wasn't even considering it a loan." No written agreement was created concerning the money. After defendant bailed out, he gave Miller $3,000 in cash, explaining that he did not need it for bail. Miller eventually received the remaining $47,000 in a check from the county because defense counsel requested that the county pay that amount to her out of the cash bail deposit.

Kathryn Tyler was a deputy clerk for the El Dorado County Board of Supervisors. She heard Miller say that defendant needed money for bail. Tyler immediately took a break from work, went to her bank, and withdrew $8,000. She returned to work, went into defendant's office, and handed an envelope with $8,000 in cash to defendant's wife. Tyler considered the money to be a loan and expected to be paid back. Defendant's wife wrote a check to Tyler returning the money later the same day. There was no written agreement concerning the money.

After defendant turned himself in at the jail, his wife paid $55,000 in cash for bail, and the jail issued her a receipt. On the receipt, defendant's wife wrote: "I, Jennifer Dawn Nutting, hereby assign to Katherine Miller all right and title and ownership of $47,000 of the 55,000 deposited on 5-28-2013 as a cash bail for Raymond James Nutting . . . . I further acknowledge that Katherine Miller provided cash funds in the amount of $47,000, which amount[] was used for the above-referenced bail." Defendant's wife put the receipt in an envelope with Miller's name on it and put it in the outbox on defendant's desk at his office.

Two months later, in July 2013, defendant's request to have cash bail exonerated was granted, and, at the request of defense counsel, $47,000 was sent to Miller and $8,000 to defendant's wife.

A jury convicted defendant of one misdemeanor count of receiving an illegal loan from a county contractor (Gov. Code, § 87460, subd. (c); count 5), two misdemeanor counts of receiving an illegal loan from a county employee (Gov. Code, § 87460, subd. (a); counts 7 & 9); and three misdemeanor counts of failing to document loans (Gov. Code, § 87461, subd. (a); counts 6, 8 & 10). The jury acquitted defendant of attempting to obtain an illegal loan from a county contractor (Gov. Code, § 87460, subd. (c); Pen. Code, § 664; count 11) and acquitted defendant of three felony counts (counts 1, 2 & 4). The jury could not reach a verdict on another felony count, which was later dismissed in the interest of justice.

The trial court granted summary probation with 30 days in jail. And the court declared defendant's seat on the El Dorado County Board of Supervisors vacant under Government Code section 1770, subdivision (h).

DISCUSSION

I

Instruction on Personal Loan

Because defendant was charged with receiving personal loans from (1) county employees and (2) a contractor who does business with the county, it was necessary for the trial court to define "personal loan" for the jury. It did so using the definition of a loan in Civil Code section 1912; however, it changed some of the wording. Defendant contends that the change in wording and additional instructions on the matter misstated the law and removed the objective intent of the parties to the loan from the jury's consideration. We conclude that there is no reasonable likelihood the court's instruction misled the jury.

Government Code section 87460, subdivision (a) prohibits elected officials from receiving a "personal loan" from any employee of the elected officials' agency.[1] And subdivision (c) of the same section prohibits elected officials from receiving a "personal loan" from anyone who has a contract with the elected official's agency.[2]

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[1] Government Code section 87460, subdivision (a) provides: "No elected officer of a state or local government agency shall, from the date of his or her election to office through the date that he or she vacates office, receive a personal loan from any officer, employee, member, or consultant of the state or local government agency in which the elected officer holds office or over which the elected officer's agency has direction and control."

[2] Government Code section 87460, subdivision (c) provides, in part: "No elected officer of a state or local government agency shall, from the date of his or her election to office through the date that he or she vacates office, receive a personal loan from any person who has a contract with the state or local government agency to which that elected

"Personal loan" is not defined in the relevant Government Code section and there is no CALCRIM instruction providing a definition, but the parties agree that the definition of a loan in the Civil Code applies. Civil Code section 1912 provides, in part: "A loan of money is a contract by which one delivers a sum of money to another, and the latter agrees to return at a future time a sum equivalent to that which he borrowed. . . ."

The trial court gave the following instruction concerning a personal loan:

"A personal loan is an action by which one party delivers a sum of money or other property to another party, and the latter agrees to return at a future time a sum of money equivalent to, or the property, which was borrowed.

"The terminology used by the giver of the sum of money or property to refer to it shall not be considered by the jury in determining whether or not it was a loan.

"The intended purpose for which the party received the sum of money . . . shall not be considered by the jury in determining whether or not it was a loan."

In his opening brief, defendant claims the instruction misled the jury because "the transactions were not loans, but arrangements for bail under [Penal Code provisions] applicable to cash bail deposits." Defendant argues that the instruction misled the jury in three ways: (1) it prevented the jury from ascertaining the intent of the parties in giving defendant the money; (2) it instructed the jury to disregard the terminology used by the giver; and (3) it instructed the jury to disregard the intended purpose and use of the loan. The arguments all fail because whether defendant and the people who loaned the money to defendant intended for him to use it as a cash bail deposit did not change the fact that the people loaned money to defendant; they delivered money to him with the mutual intent that he would pay it back to them, which he later did.

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officer has been elected or over which that elected officer's agency has direction and control. . . ."

Alleged instructional errors do not merit appellate relief unless there is a reasonable likelihood that the instructions as a whole misled the jury to the defendant's prejudice. (*Boyde v. California* (1990) 494 U.S. 370, 380 [108 L.Ed.2d 316, 329]; *People v. Kelly* (1992) 1 Cal.4th 495, 525-526.) We must assume that jurors are intelligent people who are capable of understanding, correlating, and following all instructions. (*People v. Scott* (1988) 200 Cal.App.3d 1090, 1095.)

Defendant fails to support his argument that it was relevant that he intended to use the money he received from the various people for a cash bail deposit. Even if every fact he alleges is true, his argument fails. Even if each person who gave him money intended for him to use it as bail, it was still a loan because he accepted the money from that person with the agreement that he would pay it back. Even if he actually used the money for a cash bail deposit soon after he received it and returned the surplus immediately, it was still a loan because he accepted the money from the person with the agreement that he would pay it back.

Defendant's opening brief is long on argument and very short on authority. He cites no authority for the proposition that if the various people gave him money with the intention that he use it for a cash bail deposit, the money provided could not constitute a personal loan. He cites no authority for the proposition that it is not a personal loan if he received the money intending to use it for a cash bail deposit. There simply is no such authority.

With these principles in mind, we consider whether the instruction misled the jury, and we conclude that the instruction did not.

The instruction informed the jury that a personal loan is "an action by which one party delivers a sum of money or other property to another party, and the latter agrees to return at a future time a sum of money equivalent to, or the property, which was borrowed." This language essentially mimics Civil Code section 1912, except that the trial court substituted "action" for "contract." Defendant suggests that using the word

"action" instead of "contract" withdrew from the jury's consideration the objective intent of the parties. We conclude that, even if the trial court should have used "contract" instead of "action," the change from the statutory definition did not mislead the jury in any way relevant to the facts of this case. Defendant's claim to the jury was that he intended to use the money for bail, not that he did not intend to pay it back. The facts of this case were that defendant received the money with the mutual intent that it would be paid back. Under these circumstances, changing "contract" to "action" did not withdraw from the jury any relevant matter because receiving money with an agreement to pay it back is a loan. Using "contract" instead of "action" in instructing the jury on the definition of "personal loan" would not have made relevant defendant's claim that he intended to use the money for bail.

The court instructed the jury that the "terminology used by the giver of the sum of money . . . shall not be considered . . . in determining whether or not it was a loan." According to defendant, "[t]his was an instruction to selectively ignore testimony unfavorable to the prosecution and which supported [defendant's] position in this case." The problem with this argument is that defendant's position in this case—that it was not a personal loan if the parties intended for him to use the money for a cash bail deposit—was not a legally-tenable defense. Therefore, the instruction did not mislead the jury by telling the jury to disregard the terminology used.

Finally, the court informed the jury that defendant's intended use of the funds was not relevant. That instruction was proper in this case in which defendant has failed to establish that his intended use of the funds was legally relevant.

Defendant's contention that the trial court's instruction concerning a "personal loan" was a misstatement of the law and misled the jury is without merit.

II

Instruction on Cash Bail Deposit

Similarly, defendant contends that the trial court erred by not giving his proposed instruction about cash bail deposits. Since the intended use of the loaned money was not relevant, the court was under no duty to instruct the jury about that intended use.

Defendant requested the following instruction about cash bail deposits:

"*Bail* provides for the release from custody of a person who has been arrested and charged with a criminal offense, in exchange for security given to guarantee the person's appearance at later hearings and trial. *Bail* also refers to the actual security given, and can include a bail bond, equity in real property, or a cash deposit.

"A defendant or any other person may deposit cash instead of a bail bond, in the amount of bail required. The deposit shall be given to the clerk of the court in which the defendant is held to answer. The deposit is retained by the clerk of the court to ensure defendant's appearance. Ownership of the money is retained by the depositor; it does not transfer to the defendant.

"When money has been deposited, a receipt shall be issued in the name of the depositor. If the person to whom the receipt was issued was not the defendant, the deposit shall be returned to that person when the bail is exonerated. Exonerate means to release the security for the bail.

"Bail may be exonerated by an order of the court, by providing substitute security such as a bail bond, or at the time of a judgment in the case." (Original italics.)

The trial court rejected the instruction because the defense did not establish that if the money was used as bail it was not a loan. Furthermore, none of the three lenders deposited the bail money with the county.

We need not consider whether this proposed instruction was legally accurate or otherwise defective because defendant fails to establish that it is relevant to the issues properly placed before the jury.

The sole legal authority defendant provides for his contention that the trial court should have given this instruction is Civil Code section 1912, which, as we have discussed, gives the definition of a loan. Nothing in that statute makes the intended use of the loaned money relevant to whether a loan was made.

III

Scienter Element of the Offenses

The trial court instructed the jury that to be guilty of the misdemeanor offenses alleged in this case defendant had to "willfully and knowingly receive[] a personal loan." Defendant contends that the court's instruction that the intended use of the loan was not relevant conflicted with this instruction that the commission of the offense must be willful and knowing. The contention makes no sense at all.

As with other contentions, defendant's opening brief provides no authority for his contention. Once again, he cites Civil Code section 1912, but he cites no statute or case concerning scienter requirements or general intent crimes. Failure to provide authority forfeits the contention. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793.)

Government Code section 87460 does not contain the words "willful" and "knowing" in defining the crimes of receiving a personal loan from a county employee or a contractor who does business with the county. The trial court merely added those words because they describe a general intent crime.

"The use of the words knowingly and willfully in a penal statute usually define a general criminal intent. [Citation.] There can be specific intent crimes using the terms but the specific intent in those instances arises not from the words willfully or knowingly, but rather from the requirement in those offenses there be an intent to do a further act or achieve a future consequence. [Citations.]" (*People v. Bell* (1996) 45 Cal.App.4th 1030, 1043.)

The only intent required to violate the Government Code sections at issue here was the general intent to receive a personal loan from a county employee or a contractor

who does business with the county. What the parties to the loan intend the borrower to do with the money is irrelevant. Therefore, it makes no sense to argue that the instructions given in this case misstated the law or misled the jury on the scienter element of the crimes.

IV

Cumulative Error

Defendant contends that, even if the asserted errors were harmless individually, they were collectively prejudicial. Since we find no error, we need not consider cumulative prejudice.

We note that in this argument, defendant cites an exchange at trial between a juror and the trial court. In a note, the juror asked, "Will the judge explain the law between loaning to a county employee and allowing bail to be given to a county employee?" The court responded in open court that such issues are typically addressed in jury instructions.

This exchange reveals nothing more than that the defense's theory—that these were not loans but instead bail payments—had been successfully conveyed to the jury. The fatal defect, however, is that the theory was not legally tenable. Therefore, it was not error for the trial court to refuse to instruct on the defense's theory.

V

Trust or Bailment Theory

In his reply brief on appeal, defendant presents a new theory—that the exchange of money between him and those who gave him money was a trust arrangement or a bailment. Defendant never proffered a trust or bailment theory before his reply brief on appeal. Consequently, neither the trial court nor the prosecutor at trial, nor also the Attorney General on appeal, has had an opportunity to consider this theory and respond to it. "It is axiomatic that arguments made for the first time in a reply brief will not be entertained because of the unfairness to the other party." (*People v. Tully* (2012) 54

Cal.4th 952, 1075.) Defendant therefore forfeited reliance on this theory by failing to raise it sooner.

In any event, the theory does not help him.

Defendant relies primarily on *People v. Pierce* (1952) 110 Cal.App.2d 598 (*Pierce*) for his assertion that the transfer of money to him from the various people constituted a deposit in trust rather than a personal loan. In *Pierce*, the defendants formed a company to produce gypsum. They entered into contracts with distributors of the product and required those distributors to pay cash (usually $5,000) to be held as "a bond of faithful performance." When the company went bankrupt, the defendants could not pay back the entrusted funds because they spent the money. (*Pierce, supra,* 110 Cal.App.2d at pp. 600-604.) Found guilty of embezzlement, the defendants argued on appeal that the cash paid to them was in the form of a loan or investment dischargeable in bankruptcy, and therefore did not constitute embezzlement. The Court of Appeal disagreed. The court concluded that the evidence was sufficient to prove that defendants held the distributors' funds in trust, not as a loan or investment. Using the funds for an unauthorized purpose, rather than as a bond for the distributors' faithful performance, constituted embezzlement. (*Id*. at pp. 604-609.)

In its discussion concerning whether the funds were held in trust, the *Pierce* court gave this summary of the law concerning creation of trusts:

"Whether a trust relationship arises from a particular transaction is to be determined from any written agreement plus the acts and declarations of the parties. The determination of the intention is not limited to a construction of the writing. This is particularly true in the criminal field since the prosecution is not bound by any such contract. [Citations.] It is well settled that no particular language or terminology is needed to create a trust, and that the words 'trust' or 'trustee' need not be used. [Citation.] As stated in 25 California Jurisprudence, pages 140-141, section 17, 'Contractual relations are creative of trusts in infinitely varying circumstances . . . a

"trust" exists where property or funds are placed by one person in the custody of another, -- e.g., a deposit of money to be retained . . . -- or where the legal title of property is conveyed for a limited purpose, as for example, the securing of performance of an obligation by the transferor.' In order to establish a trust it is necessary to offer clear and convincing proof thereof. Such proof, however, may be indirect, consisting of acts, conduct, and circumstances, and 'the question whether the showing is clear and convincing is primarily one for the trial court.' [Citation.]" (*Pierce, supra,* 110 Cal.App.2d at p. 605.)

Defendant argues: "In law, it takes two people to make a contract. Here, the providers of funds offered the funds for bail. [Defendant] stated he wanted the money for bail and his subsequent emphatic conduct proved his intent to take the funds for the limited purpose to place the provided funds in the custody of the county to be repaid by the county to the contributor. His original intent is proven from his subsequent conduct."

Contrary to defendant's argument, this evidence is not sufficient to establish that he held the money in trust, even assuming the providers knew that he would use it as bail. While, as stated in *Pierce*, no particular language is required, the provider and receiver must agree that the funds are received in trust, not just that the provided funds will be used for a specified purpose. Indeed, it is unremarkable that the provider of a loan knows what the money will be used for. And the fact that the money is paid back promptly after the purpose for which it was provided is fulfilled also does not establish a trust. If defendant had failed to return the money in this case, he would not have been guilty of embezzlement because he did not hold the money in trust. At most, he would be civilly liable to the providers of money for failing to pay the money back.

The *Pierce* court, commenting on the facts of that case, wrote: "These written agreements together with the negotiations, both before and at or about the time of their execution, furnish ample evidence of an intention on the part of the dealers that a trust relationship existed and a recognition on the part of defendants of such fact." (*Pierce,*

supra, 110 Cal.App.2d at p. 606.) There is no such evidence of intent to form a trust in this case. In *Pierce,* the providers were induced to give the defendants money by the statement that it would be held in trust, as "a bond of faithful performance." No similar trust language was used here. Neither the language used nor the conduct of the parties support an inference that a trust was established.

Without more, providing money to someone else with the promise that the money would be paid back creates a loan, not a trust relationship, no matter the mutually understood use(s) to which the loan may be put. Here, the evidence established only a loan.

If the providers had given the money directly to the county, and not directly to defendant and his wife, we would have a different case with different issues. But here, there is no evidence that the parties to the loan intended to create a trust or actually created a trust by the transfer of money to defendant.

Defendant also uses the word "bailment" in his reply brief to describe the relationship between him and the providers. But he provides no discussion concerning what is a bailment and no argument or authority that a bailment was created. He therefore forfeited consideration of that point. (See *People v. Stanley, supra,* 10 Cal.4th at p. 793.)

Defendant's belated attempt to proffer the theory that he received the funds from the providers in trust or as a bailment is without merit. The trial court did not prejudicially err in giving the disputed instructions.

DISPOSITION

The judgment is affirmed.

NICHOLSON, Acting P. J.

We concur:

DUARTE, J.

RENNER, J.